

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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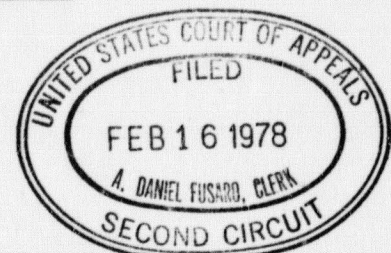
UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

ANTHONY PERSUITTI,
Defendant-Appellant

Appeal from the United States
District Court for the District
of Vermont in Criminal File
No. 77-19-2

BRIEF OF DEFENDANT-APPELLANT
ANTHONY PERSUITTI



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Statement of the Issues

1. Did the District Court commit reversible error by admitting the FDIC's Record of Insurance for the Merchants Bank, White Street Branch?
2. Did the District Court commit reversible error by allowing the United States Attorney to cross examine the Defendant Persuitti about facts underlying his 1973 state conviction for aggravated assault?

Statement of the Case

Anthony Persuitti appeals from the judgment of conviction entered against him in the United States District Court for the District of Vermont on a jury's verdict finding him guilty of entering a federally insured bank with intent to rob it in violation of 18 U.S.C. §2113(a) and of conspiring to receive proceeds from the robbery of a federally insured bank in violation of 18 U.S.C. §371.

On May 1, 1976 two men robbed the White Street Branch of The Merchants Bank in South Burlington, Vermont. The robbers entered the bank at night through a ground floor window, hid in the safe deposit box stalls and held the bank employees up at gunpoint when they arrived to open the branch for Saturday morning convenience banking hours.

Douglas Ferrier and Paul Caruso, two ex-convicts recently released from Vermont prisons, were indicted for the robbery and related federal crimes late in 1976 and pled guilty to the bank robbery charge in early 1977. Through their grand jury testimony the Government then obtained indictments against at least five other men including the Defendant Persuitti on various charges.

The grand jury's indictment of May 12, 1977, which superseded a similar indictment handed up on March 31, 1977, accused the Defendant Persuitti in two of five counts.

Count I charged Persuitti with violating 18 U.S.C. §2113(a) by entering The Merchants Bank, White Street Branch, with Paul Caruso on March 27, 1976 apparently in an abortive attempt to rob the bank some five weeks before Caruso and Ferrier succeeded.

Count V charged Persuitti with violating 18 U.S.C. §371 by conspiring with co-Defendants Dupaw, Woodmansee, Sr. and Woodmansee, Jr. and with unindicted co-conspirators Caruso and Ferrier to receive or dispose of the proceeds of the May 1 robbery.

The unusual aspect of the case was that Defendants Persuitti and Dupaw were inmates at the Chittenden Community Correctional Center in South Burlington, Vermont when they allegedly committed the crimes charged in the indictment.

After a change of venue the case was tried to a jury in the United States District Court in Brattleboro, Vermont before Chief United States District Judge James S. Holden. The trial began on June 12, 1977 and lasted six weeks. The Government called over thirty witnesses in its case in chief and their testimony took thirteen trial days. But only Caruso and Ferrier implicated Persuitti in the crimes charged in the indictment.

Caruso and Ferrier testified that Persuitti conspired with Caruso at the Correctional Center during Caruso's frequent visits to his former cellmate, Dupaw, and with Ferrier at REACH, a Burlington meeting place for ex-offenders,

where Persuitti worked most days while on pass from the Correctional Center. The two confessed bank robbers further testified that while on a weekend pass from the Correctional Center Persuitti entered the White Street Branch of The Merchants Bank with Caruso in the early morning of March 27, 1976 intending to rob it but that the men left the bank soon after entering it because they feared the bank manager would notice damage they had done to the window of his office and call the police when he arrived. According to Caruso and Ferrier, Persuitti intended to try to rob the bank with Caruso again but was prevented from doing so because the correctional authorities revoked his weekend passes. Caruso and Ferrier testified that Persuitti let them use REACH as a staging area for the May 1 robbery, and Ferrier testified that soon after the robbery he gave Persuitti a few hundred dollars from the proceeds at REACH.

On July 21, 1977 the jury rendered a verdict of guilty as to each of the three co-Defendants remaining at the end of the trial on each count of the indictment submitted to it. Persuitti was convicted of the crimes charged in Counts I and V of the indictment, and on September 14, 1977 Judge Holden sentenced him to seven years imprisonment on Count I and five years on Count V, both sentences to run concurrently with each other but consecutive to the sentence for his 1973 state conviction.

Argument

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ADMITTING THE FDIC'S RECORD OF INSURANCE FOR THE MERCHANTS BANK.

At the opening of the second day of trial (Transcript pages 273-4) the District Court admitted into evidence over the objection of all defense counsel Government's Exhibit 2 captioned "Proof of Official Record" which the Government offered to prove that The Merchants Bank, White Street Branch, was federally insured on March 27 and May 1, 1976. This, of course, was a material element of the crimes charged against all Defendants and Government's Exhibit 2, the only evidence offered to prove that fact, was therefore crucial to the Government's case.

Government's Exhibit 2 contains written assertions constituting statements FRE 801(a)(1) which the Government offered to prove the truth of the matters asserted in them. FRE 801(c). The statement that The Merchants Bank was federally insured in 1976 contained in Government's Exhibit 2 is, therefore, hearsay and inadmissible unless covered by an exception to the hearsay rule set forth in FRE 803 or 804.

If the statements contained in Government's Exhibit 2 fall within the ambit of FRE 803(8) and (10) which exempt certain public records from exclusion under the hearsay

rule, the statements are hearsay nevertheless and crucial to the Government's case. Under these circumstances the rule suggested by this Court's dictum in U. S. v. Oates, 560 F.2d 45 (2d. Cir. 1977) would require the trial court to determine specifically, prior to deciding whether to admit the statement, that its introduction would not violate the confrontation clause of the Sixth Amendment to the United States Constitution. But the District Court admitted Government's Exhibit 2 routinely without expressly considering this constitutional issue (Transcript p. 274) in clear violation of the rule suggested in Oates.

Furthermore, the court's opinion in Oates suggests that it was the Government's obligation before offering this crucial hearsay evidence either to produce the extrajudicial declarant or show his unavailability. U. S. v. Oates, supra, at 83. The Assistant U. S. Attorney offered no explanation at trial for his failure to produce Mr. Miller, Ms. Kingsbury or Mr. Willey, the declarants whose extrajudicial statements are contained in Government's Exhibit 2.

Because neither of the requirements suggested by Oates were met, the admission of Government's Exhibit 2 violated the confrontation clause and, therefore, constituted reversible error.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR
BY ALLOWING THE U. S. ATTORNEY TO CROSS
EXAMINE THE DEFENDANT PERSUITTI ABOUT THE
FACTS UNDERLYING HIS 1973 STATE CONVICTION
FOR AGGRAVATED ASSAULT.

On the twentieth day of trial the Defendant Persuitti took the stand to testify in his own behalf. The transcript of the trial to that point is more than 2900 pages long. Of the more than thirty witnesses the Government called in its case in chief only two, Caruso and Ferrier, directly implicated Persuitti in the crimes charged in the indictment.

In the first minutes of Mr. Persuitti's direct examination the following questions were asked and answered:

Direct Examination by Mr. Sartore

- Q. . . . Before you were in custody of the federal government were you in custody of the State of Vermont?
- A. I was.
- Q. And how long have you been in the custody of the State of Vermont?
- A. Over well almost five years.
- Q. Are you presently serving a sentence with the State of Vermont, the State of Vermont Department of Corrections?
- A. Yes. Eight to twelve years.
- Q. Eight to twelve years?
- A. Yes.
- Q. And what was that sentence for?
- A. Aggravated assault.
- Q. When were you convicted of that?

A. January, 1973.

(Transcript p. 2922.)

Early in the Government's cross examination of Mr. Persuitti the District Court allowed the United States Attorney to ask the following questions and obtain the following answers over objection:

Cross examination by Mr. Cook:

Q. Now I believe you testified when you first in the first questions from Mr. Sartore that you were, prior to being arrested federally, you were serving part of an eight to twelve year sentence, is that right?

A. That's right.

Q. And I think that your words were that that particular sentence I think your words were, I don't have my notes in front of me, but that was a sentence for aggravated assault.

A. That's right.

Q. Would it be more correct to say that that was the sentence for a state offense in Vermont for your knowingly and purposely causing bodily injury to a person with a deadly weapon?

A. Would you care to repeat that question please?

Q. Yes. I will ask the court reporter to read it back.

Mr. Sartore: May we approach the bench Your Honor.
[Bench conference at which counsel for Persuitti objected to Government's cross examining about facts underlying conviction]

The Court: We will allow the Government to acquire along those lines.

By Mr. Cook:

Q. I wonder if we could have the court reporter, Your Honor, read back the pending question? (Last pending question read by the reporter.)

A. Did I cause somebody bodily harm?

Q. Yes.

A. I caused no one any bodily harm.

Q. Is that not what you plead guilty to?

A. I never pled guilty to that.

Q. I said you pled guilty to it. Were you tried by a jury on that particular charge that I have just mentioned?

A. Yes I was tried by a jury.

Q. And in fact the name of the person who was the victim of that charge was a Margaret Mondello.

Mr. Sartore: I object to that Your Honor. . . .

The Court: Objection overruled.

Q. Repeat the question please. (last question read by the court reporter)

A. Sir, are you asking me if I assaulted a woman?

Q. I asked you if you can answer that question.

A. I am asking you are you accusing me of assaulting that woman?

Q. I am asking you if you were convicted by a jury of knowingly and purposely causing bodily injury to Margaret Mondello with a deadly weapon, to wit, I won't name the weapon at this point. Now, I am asking you if you were convicted by the jury in the State of Vermont, on the 31st day of January, 1973 of the offense that I have just stated?

A. I was found guilty to that charge, yes, but I am also saying that I don't I'm telling you I didn't assault nobody (simultaneous voices).

Q. Your attorney can inquire on that. You were found guilty by a jury.

The Court: Yes, just a minute Mr. Cook., We will allow the witness to explain that.

Mr. Sartore: Thank you Your Honor. Go ahead Mr. Persuitti.

A. I did not assault anybody.

Q. But the charge which I have just stated was in fact (simultaneous voices)

A. Yes. The charge, I am saying that I did not bodily harm anybody or assault anybody.

Q. Now as a part of that charge or part of that offense were premises entered?

A. Not by me sir.

Q. Were not premises entered by an accomplice of yours?

A. That's what the State says.

Q. You were at the trial?

A. Sir, there is another person in this case that has not been brought to trial yet.

Q. But to answer my question, sir, in the particular offense of what you are charged with, which you were charged with in that case, and which you were found guilty by a jury, are you saying that an accomplice of yours did not illegally enter the premises?

A. I am not saying no such thing sir.

Q. Is it a fact that an accomplice of yours did illegally enter premises?

A. An accomplice of mine sir. I stood trial and

Q. I am asking you did an accomplice of yours in that case

A. I'm not I didn't have no accomplice sir.

Q. Now do you understand what you have been charged with in this case?

A. Yes I understand.

Q. You understand that as a part of I believe Count I you were charged with either attempting to enter or illegally enter The Merchants Bank on March 27, 1976, you understand that?

A. Yes I understand it.

Q. And you also understand from the evidence, that that contemplates carrying a deadly weapon, as to that charge, do you understand that?

A. I understand the charge.

(Transcript pp. 3001 through 3006)

Counsel for Defendant Persuitti, having objected specifically to this line of questioning (Transcript pp. 3002-3004), moved the Court at the close of the Government's cross examination of Mr. Persuitti to strike the testimony regarding the circumstances of Mr. Persuitti's arrest and conviction in 1972 and 1973. The District Court denied the motion to strike. (Transcript pp. 3037-3038). The following day counsel for Defendant Persuitti again renewed the motion to strike the foregoing testimony and submitted additional authorities to the District Court in support of his motion. The motion was again denied. (Transcript pp. 3258-3269)

The District Court committed prejudicial error in allowing the United States Attorney to cross examine the Defendant Persuitti about his 1973 conviction in the State of Vermont beyond the date and place of the conviction, the nature of the offense and the punishment imposed. The Court further erred in instructing the jury that it could consider the Defendant's prior conviction on a charge of aggravated assault as bearing on his intent to commit the crimes for which he was indicted in this case.

The facts surrounding the Defendant's 1973 conviction

for aggravated assault are summarized in State v. Persuitti, 133 Vt. 354, 339 A.2d 750 (1975). There is no doubt that the conviction was admissible to impeach the Defendant under FRE 609 once he elected to take the stand. For obvious tactical reasons Defendant Persuitti testified frankly about his prior conviction early in his direct examination. However, when evidence of a felony conviction is admitted to impeach a witness and particularly when the witness is the accused in a criminal proceeding, the better practice and the one which generally prevails according to McCormick is that beyond the name of the crime, the time and place of conviction, and the punishment imposed, further details, such as the name of the victim and the aggravating circumstances may not be inquired into. McCormick on Evidence (2d. ed. 1977), §43 p. 38.

The name of the victim and the aggravating circumstances were, of course, exactly what the Government was allowed to ask about over the objection of Defendant's counsel. Although this rationale was later withdrawn by the Government, the United States Attorney at first offered the evidence as tending to prove that the Defendant was "capable of having intent when he is or has been convicted of a crime which involves illegal entry and which involves either through himself or an accomplice to the carrying of a deadly weapon." (Transcript p. 3038, lines 19 through 22)

The District Court recognized the general prohibition against admitting evidence of other crimes to prove that the Defendant acted in conformity with a "bad character" stated in FRE 404, but admitted the evidence as bearing on the Defendant's "intent" and instructed the jury to consider the evidence on that issue. (Transcript p. 3718, lines 14 through 22)

The District Court did not admit the additional testimony regarding the 1973 aggravated assault conviction to prove that the attempted bank robbery was the Defendant's handiwork, for as McCormick states, this exception to the general rule prohibiting proof of other crimes except to impeach requires much more than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device must be so unusual and distinctive as to be like a signature. McCormick on Evidence (2d. ed. 1972) §190(3), p. 449; see U.S. v. Woods, 480 F.2d 127 (4th Cir. 1973); U.S. v. McCray, 433 F.2d 1173 (D.C. Cir. 1970), and Payne v. U.S., 294 F.2d 723 (D.C. Cir. 1961).

The 1973 aggravated assault happened too long ago and was too different a crime to have any probative value with respect to the Defendant Persuitti's state of mind on March 27, 1976. Furthermore, the Defendant Persuitti's intent was never really an issue because he denied even being present at The Merchants Bank on March 27, 1976. Proof of the aggravating circumstances of a violent crime which occurred

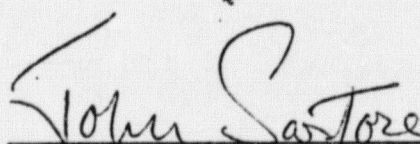
nearly five years ago could only prejudice the jury against the Defendant. The Court's instruction that such evidence was properly for the jury's consideration compounded the prejudicial effect of this evidence and entitles the Defendant Persuitti to a new trial.

Conclusion

For the reasons stated, the Court should set aside the verdict of guilty and enter a judgment of acquittal or, in the alternative, the Court should grant the Defendant Persuitti a new trial.

Burlington, Vermont, February 10, 1978.

Respectfully submitted,

A handwritten signature in cursive script, reading "John Sartore". The signature is written in dark ink and is positioned above a horizontal line.

John T. Sartore, Attorney for
Defendant-Appellant
Anthony Persuitti